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In the Supreme Court of the United States

OCTOBER TERM, 1982

CINCINNATI ASSOCIATION FOR THE BLIND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board properly concluded that blind persons working in petitioner's sheltered workshop are "employees" within the meaning of Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and that it would effectuate the policies of the Act to assert jurisdiction over those employees.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Chicago Lighthouse for the Blind, 225 N.L.R.B. 249 5

Dundee Cement Co., 170 N.L.R.B. 422 9

Goodwill Industries of Southern California, 231 N.L.R.B. 536 ..... 3, 4, 5, 7, 8

NLRB v. *Lighthouse for the Blind of Houston*, 653 F. 2d 206, rehearing granted, 679 F. 2d 379 7

NLRB v. *Plasterers' Local Union No. 79*, 404 U.S. 116 6

Packard Motor Car Co. v. *NLRB*, 330 U.S. 485 8

Riker Laboratories, 156 N.L.R.B. 1099 9

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 7

Page

Statutes and regulation:

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 6

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

Section 2(3), 29 U.S.C. 152(3) 5
Section 8(a)(1), 29 U.S.C. 158(a)(1) 3
Section 8(a)(5), 29 U.S.C. 158(a)(5) 3

29 C.F.R. 525.8(d) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 672 F. 2d 567. The decision and order of the National Labor Relations Board (Pet. App. 1c-12c) are reported at 244 N.L.R.B. 1140. The Board's decision in the underlying representation proceeding (Pet. App. 1b-5b) is reported at 235 N.L.R.B. 1448.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1982. The petition for a writ of certiorari was filed on June 11, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 1d-2d.

STATEMENT

1. Petitioner is a nonprofit corporation providing social and technical services to visually handicapped persons. It operates a sheltered workshop at which approximately 70 handicapped and 4 nonhandicapped employees assemble, sew, and package products which petitioner has contracted to produce. In 1976, workshop sales exceeded $2 million and generated a profit of $144,000 (Pet. App. 2b-3b). Many of petitioner's contracts were obtained by bids submitted in competition with profit-making firms (Pet. App. 3a, 3b; A. 90).[1]

Most blind workshop employees are paid on a piece-rate basis—that is, their wages are determined by how many items they produce or package per hour. A few blind employees and all sighted workers are paid on an hourly basis (Pet. App. 3a). Employees paid on a piece-rate basis earn wages ranging from $.58 to $6 per hour (Pet. App. 3b).[2] Both blind and sighted workers work from 8:30 a.m. to 4:30 p.m., five days a week. Blind workers receive holiday pay, vacation pay, workmen's compensation insurance, and life insurance. Sighted employees receive all of these benefits and a pension plan as well (Pet. App. 4a).

All workshop employees are supervised by the workshop manager, two contract shop supervisors, the paper products supervisor, and the quality control supervisor. Blind workers are suspended or terminated for serious misconduct such as violence or theft. They are not suspended or terminated for production errors, but are expected to produce goods meeting the quality standards of the marketplace. A handicapped worker who is twice reprimanded for

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[1] "A." refers to the appendix in the court of appeals.

[2] Petitioner is permitted, under a sheltered workshop certificate obtained from the United States Department of Labor, to pay its blind employees less than the minimum wage (Pet. App. 3a-4a).

production errors is referred to the Work Evaluation Unit for "retraining," and is paid at a reduced rate or not at all (Pet. App. 3a-4a). The workshop does not have vocational or rehabilitation counselors or social workers on its staff (A. 404). Workers wishing to utilize the social services offered by petitioner must seek them in the same manner as blind members of the community who are not employed by petitioner (Pet. App. 11a).

Blind employees are referred to the workshop by caseworkers, but the final hiring decision is made by the workshop manager (Pet. App. 3a). The workshop offers long-term employment with little emphasis on the acquisition of skills which would enable the blind workers to obtain employment elsewhere (Pet. App. 11a). Very few blind workers leave petitioner's employ to enter the competitive job market (Pet. App. 4a).

2. The Board (Member Murphy dissenting) found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union[3] which, pursuant to the results of a representation election, had been certified by the Board as the bargaining representative of petitioner's blind and sighted production and maintenance employees and its shipping and receiving employees (Pet. App. 1c-12c).

In ordering an election among petitioner's employees, the Board (Member Murphy dissenting) rejected petitioner's contention that it should decline to assert jurisdiction over petitioner's employees because of the rehabilitative purposes of the workshop. Distinguishing *Goodwill Industries of Southern California*, 231 N.L.R.B. 536 (1977), the Board

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[3]Truck Drivers, Chauffeurs and Helpers Local Union No. 100, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

pointed out that there the work program "was one element of the rehabilitation plan, not an enterprise in itself" (Pet. App. 3b). The Board added that here, unlike there, the product had to meet normal commercial standards and "normal economic considerations [were] a significant factor in the [employee-employer] relationship" (Pet. App. 3b-4b).

The Board further found that "an overall production and maintenance unit" was an appropriate bargaining unit, noting that sighted and blind employees "work closely together at the workshop and perform interdependent functions. Both groups of employees share common supervision and substantially similar terms and conditions of employment" (Pet. App. 4b).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-12a). The court first rejected petitioner's argument that Congress intended to exclude handicapped workers in sheltered workshops from coverage under the Act. The court noted that the Act contains no explicit exclusion of such workers and found no evidence in the legislative history of the Act or of other federal statutes dealing with the handicapped that Congress intended to deny handicapped workers the right to bargain collectively (Pet. App. 4a-7a).

The court then found that the Board had an adequate factual basis for characterizing petitioner's workers as employees (Pet. App. 8a-9a). It also rejected petitioner's contention that the Board should have declined to assert jurisdiction, as it had in *Goodwill Industries of Southern California*, *supra* (Pet. App. 9a-10a). The court agreed with the Board that "the circumstances of the *Southern California* case differ materially from the situation at the Cincinnati workshop" (Pet. App. 11a). Noting Goodwill's short-term employment policies and the job placement,

counseling, and other social services offered, the court pointed out that "in a very real sense, Goodwill operated a rehabilitative vocational clinic" (*ibid.*).

ARGUMENT

The Board's position, upheld by the court of appeals, is that handicapped workers in sheltered workshops are employees within the meaning of the Act. However, where it has found that the employer's primary objective was rehabilitative—where the employer "might better be classified as a vocational clinic than as a viable entrepreneurial concern"—the Board has exercised its discretion not to assume jurisdiction over a sheltered workshop. *Goodwill Industries of Southern California, supra*, 231 N.L.R.B. at 537. On the other hand, where working conditions do not differ substantially from those normally found in private industry, the Board has asserted jurisdiction despite the existence of an element of rehabilitation in the work. See *Chicago Lighthouse for the Blind*, 225 N.L.R.B. 249, 250 (1976). Petitioner urges that treating handicapped workers in sheltered workshops as employees under the Act is inconsistent with congressional intent, and that even if such workers are statutory employees, its mission is primarily rehabilitative within the standard of *Goodwill Industries of Southern California, supra*. There is no merit to these contentions.

1. Petitioner's contention (Pet. 17-20) that its blind workers are not "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3),[4] is not based on any

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[4]Section 2(3) provides that the "term 'employee' shall include any employee * * * unless this subchapter explicitly states otherwise * * *." It then excludes certain workers, such as agricultural workers and supervisors, from the definition.

language in the Act. Nor does petitioner contend that anything in the legislative history of the Act shows a congressional intent to exclude handicapped workers from its coverage.[5] Rather, petitioner argues (Pet. 17-20) that collective bargaining is inconsistent with other federal statutes dealing with sheltered workshops. But, again, petitioner points to nothing in the language or legislative history of these statutes which would indicate that Congress intended to deny bargaining rights to its workers. As the court of appeals observed (Pet. App. 6a-7a), the statutes cited by petitioner indicate a congressional concern to favor sheltered workshops, but do not establish that Congress considered collective bargaining incompatible with that goal. Indeed, the Secretary of Labor, who is responsible for administering the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq., one of the statutes relied on by petitioner, filed an amicus brief in the court of appeals stating that "assertion of jurisdiction by the NLRB over workers in a sheltered workshop neither conflicts with the FLSA sheltered workshop provisions nor is detrimental to the objectives of these provisions"[6] (Amicus Br. 2-3).

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[5]Petitioner points to the fact (Pet. 20) that Congress did not enact several bills which would have explicitly subjected sheltered workshops to Board jurisdiction. However, " '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *NLRB* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130 (1971). As the court of appeals recognized (Pet. App. 5a), congressional inaction on these bills is as consistent with a belief that sheltered workshops were already covered by the Act as with a belief that they should not be covered.

[6]The Secretary noted that the FLSA sets minimum wages and working conditions for such employees, but does not preclude them from seeking higher wages or better working conditions through collective bargaining (Amicus Br. 9-10). In particular, the Secretary refuted petitioner's contention (Pet. 18-19) that the sheltered workshop would lose certification in the event of a strike. He pointed out that the regulation quoted by petitioner (29 C.F.R. 525.8(d)) does not require the revocation of an existing sheltered workshop certificate in the event of a strike,

In sum, as the court of appeals correctly concluded, petitioner has shown nothing to justify "carv[ing] out an exception to the plain language of Section 2(3) of the Act" (Pet. App. 7a).

2. Petitioner is mistaken in its claim (Pet. 12-13) of a conflict among the circuits. The Fifth Circuit has granted the Board's petition for rehearing and vacated its decision in *NLRB* v. *Lighthouse for the Blind of Houston*, 653 F. 2d 206 (1981), rehearing granted, 679 F. 2d 379 (1982), the case on which petitioner relies for its assertion of a conflict. Petitioner's further contention (Pet. 13-17) that the facts of this case are indistinguishable from those in *Goodwill Industries of Southern California*, *supra*, merely takes issue with the Board's contrary factual findings, which were upheld by the court of appeals. This evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the Board properly found that the working conditions at petitioner's workshop were more similar to conditions in private industry than the primarily rehabilitative situation in *Goodwill Industries*. In *Goodwill Industries*, competence played no part in determining either the hiring or the pay rates of workers; they received the same pay regardless of their production. 231 N.L.R.B. at 537.[7] Here, blind workers were not only paid on the basis of

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but only prohibits issuance of a new certificate so that the outcome of the labor dispute would not be influenced by the Department of Labor regulations (Amicus Br. 12-13).

[7]Petitioner disputes this (Pet. 15-16), asserting that the employees in *Goodwill Industries* must have been paid on the basis of productivity because such payments are required by Department of Labor regulations dealing with sheltered workshops. As the Secretary of Labor pointed out in his amicus curiae brief to the court of appeals (Amicus Br. 8-10), the regulations require payment on the basis of productivity

productivity, but suffered reprimands and reduction in pay for production errors. Moreover, in *Goodwill Industries* the employer designated half its jobs as short-term and actively sought employment elsewhere for its workers (231 N.L.R.B. at 537)—a procedure totally unlike that followed by most private employers. Petitioner, on the other hand, offers long-term employment with little or no emphasis on helping its blind workers find jobs elsewhere. Furthermore, in *Goodwill Industries*, counseling and other social services were an integral part of the worker's relationship with the employer (*ibid.*)—a situation not normally found in private industry, and one which suggested that rehabilitation was the primary object of that relationship. Here, blind workers receive only the social services which are equally available to all blind members of the community.[8]

3. Petitioner raises (Pet. i), but does not argue, the issue whether the Board abused its discretion by including both handicapped and nonhandicapped employees in the same bargaining unit. This factual issue does not warrant further review by this Court. In any event, it is well settled that "[t]he issue as to what unit is appropriate for bargaining * * * involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). In this case, the Board found that a unit including both handicapped and nonhandicapped

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only if employees are paid less than the statutory minimum wage; they do not preclude the payment of a uniform wage rate equal to or greater than the statutory minimum.

[8]As the court of appeals noted (Pet. App. 7a), assuming arguendo that petitioner's complaint (Pet. 20-23) that collective bargaining would interfere with the therapeutic and rehabilitative functions of sheltered workshops is well-founded, it had no application here where rehabilitative concerns are "subordinated to routine business considerations."

workers was appropriate because the two groups of employees worked closely together, performed interdependent functions, and shared common supervision and substantially similar terms and conditions of employment (Pet. App. 4b). Petitioner sets forth no basis for concluding that the Board's unit determination was an abuse of discretion.[9]

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[9]The fact (Pet. 9) that handicapped and nonhandicapped employees have different functions—the former doing production work and the latter doing maintenance work and shipping and receiving—does not show that they may not be included in the same unit. The Board has frequently held that maintenance employees and shipping and receiving employees may be included in the same bargaining unit with production employees. See, *e.g.*, *Dundee Cement Co.*, 170 N.L.R.B. 422, 424 (1968); *Riker Laboratories*, 156 N.L.R.B. 1099, 1100-1101 (1966).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID A. FLEISCHER
Attorney
National Labor Relations Board

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